**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**
**AT MBARARA**

***CIVIL SUIT NO. 44 OF 2011***

**HERBERT KABAGAMBE**
***(Administrator of the Estate of the Late***
***Peter Rugenzabatwa Kabagambe)*:::::::::::::::::::::::::::::::::::: PLAINTIFF**

***VERSUS***

**BEN KABAGAMBE :::::::::::::::::::::::::::::::::::::::::::::::: DEFENDANT**

***BEFORE: HON. MR.JUSTICE BASHAIJA K. ANDREW***

***JUDGMENT***

***HERBERT KABAGAMBE*** *(hereinafter referred to as the "Plaintiff")* brought this suit in his capacity as Administrator of the Estate of the late Peter Rugenzabatwa Kabagambe *(hereinafter referred to as the "deceased")* against ***BEN KABAGAMBE*** (*(hereinafter referred to as the "Defendant")* in respect of the premises comprised in ***Leasehold Register Volume No. 970, Folio 03, Plot No.11A, Kisoro Trading Centre, South Kigezi*** (*(hereinafter referred to as the "suit property").*

The Plaintiff seeks for a declaration and orders that the Defendant is a trespasser on the suit property since it comprises part of the deceased' estate, vacant possession, a permanent injunction restraining the Defendant from further trespassing upon the suit property, general damages, *mesne* profits, and costs of the suit.

The Plaintiff contends that though the suit property is registered in the Defendant's names, it was actually originally purchased, and the house constructed thereupon largely by the deceased, who then caused the Defendant's name to be registered on the lease, for the sole purpose that the Defendant would take care of his siblings from the proceeds of suit property. The Plaintiff thus maintains that the suit property forms part of the deceased's estate, and it should be transferred to him to be administered in accordance with the rest of the estate property.

The Defendant, on the other hand, vehemently refutes the allegations and contends that he exclusively owns the suit property which he solely acquired during the lifetime of the deceased by applying and obtaining a lease in 1969. That he took possession and constructed a building thereon, which he completed and was thereby granted a full term lease of forty-three years effective from 01/04/ 1975, and is thus the registered proprietor of the said property.

Related to the dispute herein, on the 22/06/2005, Ms. Kate Kabagambe, one of the beneficiaries of the deceased's estate, lodged a caveat on the title to the suit property to prevent any further dealings on it. The Defendant filed ***High Court Miscellaneous Application No. 56 of 2010*** seeking to have the caveat lifted on the ground that he is the exclusive owner of the suit property, and it does not form part of the deceased's estate. On the heels of said application, the Plaintiff filed the instant ***High Court Civil Suit No. 44 of 2011*** seeking orders as earlier stated. To avoid a multiplicity, both suits were ordered consolidated, and the decision in the application would abide the outcome of the main suit.

At the Scheduling Conference, the following issues were agreed upon for determination;

1. ***Whether the suit property comprises part of the estate of the deceased.***
2. ***Whether the Defendant is a trespasser on the suit land.***
3. ***The remedies available to the parties.***

Mr. Kwizera Denis, Counsel for the Defendant, raised preliminary points of law which, in my view, ought to be considered first, pursuant to provisions of ***Order6 r.28 Civil Procedure Rules(CPR)*** in event they might entirely or partly dispose of any or all or any aspect of the issues raised in the suit.

The first one is that the suit is time barred and bad in law, since it was allegedly instituted over forty- two years after the Defendant acquired the lease on the suit property in 1969, which is way beyond the twelve-year period prescribed under ***Section 5*** of the ***Limitation Act (Cap 80)*** within which an action of this nature can be instituted for the recovery of land. Counsel prayed that for this reason the suit should be dismissed with costs.

Mr. M. Sekatawa, Counsel for the Plaintiff, responded that the objection is clearly misconceived as this action is founded on trespass which is a continuing tort; and that time does not begin to run until the tort complained of ceases, and that in this case the Defendant

is still in possession and occupation of the suit property, and for that reason the cause of action arises on each day that the Defendant is in occupation. Further, that this is not an action for recovery of land, but rather one seeking a declaration that the suit property is part of the estate of the deceased.

The Plaintiff also advanced an argument, in the alternative, based on provisions of ***Section 19(1) (a)*** *and* ***(b)*** *of the* ***Limitation Act, (supra)*** to the effect that no period of limitation prescribed by the Act shall apply to an action by a beneficiary under a trust, being an action, *inter alia*, in respect of recovery from the trustee trust property or the proceeds of the trust property in the possession of the trustee or previously received by the trustee and converted to his or her use. Counsel prayed that the objection should be overruled.

In consideration of this particular point, this court fully embraced the position in the case of ***Poly Fibre (U) Ltd. v. Matovu Paul & O'rs, H.C Civ. Suit No. 412 of 2010;*** which relied on the Court of Appeal decision in ***Madhvani International S.A v Attorney General, C.A. Civil Appeal No. 48 of 2004.*** It was held therein that it is the legal position that when a court is considering whether a suit is time barred by any law or not, it looks at the pleadings only and no evidence is required.

Looking at the pleadings in the instant case, particularly paragraph 3 of the plaint, it is averred therein that;

> ***"The plaintiff's claim against the defendant is for a declaration that the defendant is a trespasser on the suit premises in the continuous tort of trespass…"***

The question which arises is whether in fact the Defendant is a trespasser. The answer is in the negative given that the Defendant is the registered proprietor of the suit property as per certificate of title (***Exhibit P1).*** Since no fraud or particulars thereof were pleaded or proved against him, his title is indefeasible in terms of ***Section 59*** of the ***Registration of Titles Act (RTA);*** and the Defendant cannot be said to be a trespasser on the suit property, which he legally owns. This effectively discounts and renders unsustainable the argument that trespass is a continuous tort, because it bears no relevant application to facts of this case.

It is, nonetheless, noted that as per the evidence in ***Exhibit P23*** *and* ***P24,*** an implied the role of a trustee was duly conferred upon the Defendant in relation to the suit property; his

attempts to deny the same notwithstanding. This is borne out by the deceased's categorical statements that he had the Defendant's name put on lease to the suit property so that the Defendant would hold the same as caretaker for the benefit of his siblings. ***Exhibit P23*** *and* ***P24*** are vernacular hand written notes of the deceased's wishes in a book, and the translated extracts thereof respectively. Of relevance to this particular point, the deceased stated, in ***Exhibit P24,*** as follows;

> ***"…. I have started building on Plot 11, Kisoro Road. I have written Benon Kabagambe's names on it in the knowledge that if it were completed it would help his siblings. In building, I utilized shillings from my salary and cattle."***

The deceased went further in the said exhibit thus;

> ***"…. In case I am no longer there, Benon will be the caretaker on behalf of the young ones who may not be able and the girls…." (Underlined for emphasis).***

The stipulated beneficiaries in accordance with ***Exhibit P3*** include Ben), Herbert (Plaintiff), Ida, Anne, Hellena and Kate.

It would follow, therefore, that this being a suit instituted by one of the beneficiaries in respect of the trust property for the recovery of the same from the trustee, provisions of ***Section 19(1)*** *of the* ***Limitation Act (supra)*** would come into play with full force. The relevant portion provides that;

> ***"(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -***
>
> ***(a) ……***
>
> ***(b) to recover from the trustee trust property or the proceeds of the trust property in the possession of the trustee, or previously receive***
>
> ***(c) ed by the trustee and converted to his or her use."***

The net effect is that the twelve - year limitation period prescribed under ***Section 5 (supra)*** ceases to apply to the instant case to the extent that it is sought to recover the suit property from a trustee. This puts the suit within the time prescribed by law.

It is noted that in the submissions in answer to the Plaintiff's submissions and further Defendant's written submissions, Counsel for the Defendant argues that the issue as relates to the suit property being held in trust by the Defendant was neither pleaded nor proved, and that the Plaintiff cannot succeed on a cause not alleged in the plaint and which is inconsistent with his pleadings and evidence. Counsel relied for this proposition on the case of ***Patel v. Joshi 919520 19 E.A.C.A. 42.***

I respectfully differ with the submissions for two reasons. ***Section 19(1)*** *of the* ***Limitation Act (supra)*** encapsulates principles of law as they relate to trusts, which once raised in any proceedings have to be addressed regardless at what stage and whether they had been pleaded or not. Secondly it is not true that the issue pertaining to the suit property being held in trust was not alleged and is inconsistent with the Plaintiff's evidence. On the contrary, evidence abounds on record which proves existence of an implied trust, and one needs not mention the word "trust" for it to be considered established. Court must carefully transcend the narrow interpretation of the evidence and infer existence of a trust and pronounce upon it accordingly. The first preliminary point of law based on limitation of the action must fail.

The second point of law which was raised relates to the alleged existence of illegalities on the face of the record, which the Defendant contends otherwise override all matters of pleadings once brought to the attention of court in whatever form. To buttress this proposition Counsel relied on the celebrated case of ***Makula International Ltd. v. Cardinal Nsubuga & Ors [1982] HCB 11.***

The first instance pointed out of the alleged illegalities is that the Plaintiff lacks *locus standi* to bring this suit. Counsel for the Defendant argued that the Plaintiff tendered in court a copy of letters of administration granted under ***Administration Cause No. 894 of 2001 (Exhibit P2)*** yet he claims to have applied for letters of administration in 1999 vide ***Administration Cause No. 894 of 1999, (Annexure R*** *to the* ***affidavit in rejoinder thereto)*** and that the two have no relationship; which according to the Defendant, is proof that the Plaintiff has no valid grant.

I have duly appraised myself on ***Exhibit P2***, the actual grant to Plaintiff under ***Administration Cause No. 894 of 2001,*** and also ***Annexture R*** to the affidavit in rejoinder;

which is a petition for letters of administration by the Plaintiff under ***Administration Cause No. 894 of 1999.*** It is clear to me that in raising this particular preliminary point the Defendant seeks to challenge the validity of the Plaintiff's grant of letters of administration and therefore, by extension, his *locus standi* as administrator of the deceased's estate to bring this action.

With due respect, challenging the validity the grant within the instant proceeding is doomed to be an exercise in futility given that the ***Succession Act, (Cap 162)*** has specific mandatory provisions as to how a grant can be opposed and/ or revoked; which cannot be side-stepped. Needless to state that without being declared invalid by a court of law, a grant and / or its validity cannot be brought into question in proceedings as in the instant case. The Defendant clearly fell into the unfortunate habit of attempting to circumvent the law, and adopted a wrong procedure in order to challenge the validity of a grant and the *locus standi* of the Plaintiff; which no court of law would countenance.

As regards the year when the application/ petition for letters of administration was made and when the grant was issued, they certainly seem to be inconsistent. This is, nevertheless, quite a minor issue that would not go to the substance of the case as to invalidate the grant. It is evidently a result of a clerical error occasioned as a result of lapses by the court that issued the grant; which, under ***Section 99*** of the ***Civil Procedure Act***, would be correctable either on court's own motion or at the instance of either party. It is not that there are two grants bearing the two differing citations, but actually ***Administration Cause No.894 of 1999*** appears on the petition for letters of administration; and not on the grant itself. This renders the point of law raised devoid of merit.

The other highlighted instance of the alleged illegalities concerns the Plaintiff's reliance on the unattested, *unwitnessed* and unproved Will in form of ***"the book"*** written by the deceased of his wishes, particularly as regards his property. Counsel for the Defendant argued that "***the book"*** is not a Will or Testament in the eyes of law and hence should be disregarded.

In consideration of this point, court makes specific reference to the application for letters of administration in 1999, and averrements in the plaint, in which the Plaintiff maintained the stance that the deceased died intestate. In paragraph 5 of the said application, it was stated that the deceased did not leave a Will as none was found, and on that basis the Plaintiff

applied for letters of administration. Further, in paragraph 4(b) of the plaint, it is particularly averred that the deceased died intestate in the early seventies. This would mean ***"the book"*** is for all practical and legal purposes not a Will; and cannot pass as one.

In addition, and most importantly, at the trial it was agreed by the parties that ***Exhibit P23*** is indeed not a Will or Testament of the deceased, but rather ***"the book"*** containing his wishes, and would be relied upon to that extent as any other document. In essence, ***"the book"*** needed not be attested, or witnessed or proved as a Will before it could be relied upon in evidence. It was treated as any other document under the rules of evidence, and it being no Will or Testament, no property could be bequeathed any under it. For the foregone reasons, point of law raised ought to fail.

The fourth point raised - still on illegalities - is that the Plaintiff placed reliance on incurably defective affidavits in support of the caveat and the present suit. Counsel Kwizera submitted that the affidavits of Advocate Peter Mukiidi Walubiri, Herbert Kabagambe and Kate Kabagambe, are based on hearsay and are outright lies, and thus do not comply with the law governing affidavits. The alleged lies relate to the depositions that the house on ***Plot No. 11A, Kisoro*** belonged to the deceased, whereas it did not; and that he constructed a permanent house thereon in 1970; whereas not.

This point relates to ***High Court Miscellaneous Application No.56 of 2010*** wherein it was ordered that the decision in it would abide the outcome of the main suit in ***H.C.C.S No. 44 of 2011***. In effect, the point of law being directly in relation to the said application - in which the legality of the affidavits in issue is being challenged - it would not be prudent to consider it separately, since the resolution of the main suit would concurrently determine whether Kate Kabagambe's claims in the application actually have any basis as regards the suit property or not.

The above aside, an affidavit is not defective merely because depositions made therein are perceived as wrong or false by the party against whom they are sought to be proved; but an affidavit is defective if it does not comply with the formal and / or substantive requirements of the law; which affidavits are generally required to conform to. Similarly, if facts as deposed in the impugned affidavits in ***High Court Miscellaneous Application No.56 of 2010*** are false in view of the Defendant, to challenge them as such would be a function of an

affidavit in rebuttal; but depending on how they are stated, merely wrong or inaccurately stated facts *per se* do not render an affidavit defective.

The point raised as regards the burden of proof is too general a point and a conclusion; which can only be drawn subject to the wholesome consideration of the entire case. Overall, no illegalities on the face of the record have been demonstrated, and the preliminary points of law lack merit, and they are overruled. I proceed to consider the main issues.

***ISSUE 1:***
***Whether the suit property comprised part of the estate of the deceased.***

The Plaintiff (PW1) testified that the deceased left a book, ***Exhibit P23*** that contained his wishes particularly those pertaining to his property. "***The book",*** which is essentially hand-written in *Rufubmbira* vernacular, along with its English translation extracts, was tendered in evidence. The main thrust is that the deceased started the construction of a building on *Plot 11A Kisoro Road* using his own money, and registered the Defendant's name on its lease, with the intention that on completion it would help the Defendant's siblings, and upon the deceased's demise, the Defendant would be caretaker of the suit property on behalf of the younger sibling who included the girls.

PW1 relied on said exhibits as proof that it was the deceased's intention to have the suit property belong to the entire family, and that the title was registered by the deceased in the Defendant's names only to be caretaker thereof; and not his in his absolute right to the exclusion of the other members of the family.

The Plaintiff further adduced evidence of several correspondences and family meetings attended by the Defendant, in which issues of the suit property were discussed at length. The minutes and correspondences are ***Exhibits P3, P4, P6, P7, P8, P9, P10 and P 12.*** They show that Defendant always admitted that the suit property did not exclusively belong to him, and that the contention on the suit property centred only on the mode of distribution; but not the ownership. The minutes and correspondences were further confirmed by CW1, Peter Kabatsi, who always acted as *amicus* to the family chairing meetings and signing most of the minutes and correspondences.

On his part, the Defendant contends that he is the duly registered and lawful proprietor of the suit property having completed construction of the building thereon and being granted a full term lease effective 01/04/ 1975 as per certificate of title - ***Exhibit P1***. Further, that he had earlier been granted a lease for an initial period effective 01/04/1969 with a condition for construction of a building thereon, hence solely owns the suit property.

The Defendant also contends that "***the book",*** which the Plaintiff sought rely upon, is of no evidential value considering that it was never proved to pass as a Will or testament; in which case it would have been required to be duly executed and attested. That since it was not attested to as legally required, its evidence should be disregarded.

In addition, the Defendant contended that the deceased did not have the capacity to write the Defendant's name on the suit land because it was unregistered public land which was vested in the Uganda Land Commission by virtue of ***Section 1*** *of the* ***Public Lands Act, 1969***; the law applicable at the time, and that ***Section 22(supra)*** entitled the grant of a lease by the Commission.

To back the above argument, the Defendant relied on the case of ***Bugisu Cooperative Union Ltd v. Lawrence Kitts, C.A. Civil Appeal No. 56 of 2001*** wherein it was held that the land in question was public and unregistered, and was vested in the Uganda Land Commission for its control and management under the provisions of the now repealed ***Public Lands Act*** and the ***Land Reform Decree (Decree No. 3 of 1975)*** and not those who sold to the Respondent, who were merely customary tenants on the public land.

Counsel for the Defendant also submitted that the several meetings' minutes and correspondences, which the Plaintiff sought to rely on ought not to be a basis upon which the Defendant can be deprived of his interest as the registered proprietor of the suit property, and that court should not rely on them since they only amplify the disagreements of the parties to the suit and their siblings.

The Defendant's Counsel also took issue with the evidence adduced by CW1, Mr Peter Kabatsi, he was either biased or intentionally declined to apply his legal skills when the parties engaged him at the time of dispute. Further, that CW1 was absent at some of the meetings whose minutes he signed, and at times relied on verbal communications some

beneficiaries had in his absence, which amounted to hearsay evidence. Furthermore, that since CW1 decided not to assist the parties as a lawyer, this court ought not to evaluate his evidence in any special way whether as expert of sorts or otherwise.

The Defendant maintained that he is the exclusive legal owner of the suit property, and that court should find him so. Also, that the transfer he made in favour of his siblings as shown in ***Exhibit P5***, was done for natural love and affection, which he later withdrew, and thus reliance on it as an acknowledgement that the suit property was not solely his is misconceived, misleading and a misdirection on the law.

In consideration of the issues raised in the submissions and the evidence, it would occur to me that the Plaintiff's case principally rests on the evidence as constituted in contents of ***"the book",*** written by the deceased comprising of his wishes, particularly with regard to his various properties. Since the author is deceased, a lot of controversy has arisen as to ***"the book's"*** nature, its admissibility in evidence or its probative or evidential value; and I believe this issue, though already partly resolved, ought to be put to rest in greater detail at the earliest in order to ensure effective determination of other subsequent issues that would be based upon it.

The Defendant argues that ***"the book"*** - ***Exhibit P 23*** - is of testamentary nature and was admitted by the Plaintiff as a Will, and as such, should be disregarded since it was not attested to as required by law. I must say that I have not found this argument to be plausible. At the risk of repetition, paragraph 4(b) of the plaint particularly dispels any doubt to the contrary by the averrement therein that the deceased died intestate in the early seventies. In my view, this could only mean that he did not leave behind a Will; and most importantly, the Plaintiff does not seek to claim that there was one such.

In addition, as already pointed out, the parties agreed, as a matter of fact, that the written wishes of the deceased be designated simply as ***"the book",*** and be admitted in evidence as such, but not as a Will. Given its nature, ***"the book"*** would thus neither fall within the ambit of ***Section 5*** of the ***Succession Act (Cap 162)*** as to the execution of unprivileged Wills, nor under provisions of ***Section 67*** of the ***Evidence Act (Cap 6)*** as to proof of execution of documents required by law to be attested. This leaves ***Exhibit P23*** and its English translation extracts simply as documents within the meaning of ***Section 2(1) (b)*** of the ***Evidence Act***

***(supra)*** whose probative and evidential value cannot be put into question based on the arguments advanced by the Defendant.

The position under ***Section 60(supra)*** stipulates that the contents of such documents may be proved either by primary or by secondary evidence. ***Sarkar On Evidence, (14th Edition) 1993, page 943,*** quoting the case of ***Dinomoyee v. Roy Lachmipat 71A8: 6CLR 101,*** authoritatively articulates that it is a cardinal rule of evidence that where written documents exist, they shall be produced as being the best evidence of their own contents.

When the above principles of evidence are applied to facts of the instant case, they fit in on "all fours" in that the original copy of ***"the book"*** (primary evidence) was physically produced for court's inspection as the best evidence for proof of its contents. Needless to restate that primary evidence is the best or highest form of evidence in the eyes of the law in that it affords the greatest certainty of the facts in issue.

The general rule of law is that the contents of a written instrument in issue which is capable of being produced must be proved by the instrument itself. (***See Sarkar On Evidence (supra)*** at page 94***).*** To the best of my understanding that is precisely what the Plaintiff did by procuring in evidence the original copy of ***"the book"*** and the relevant translated extracts thereof, and it would be unjustified to fault him on that account.

The final point on this issue is that the Defendant is found to have himself made glaring admissions, in some of the correspondences, as to the existence of "***the book"*** and his role therein as expressly stated in letter ***Exhibit P10,*** which he personally wrote to the Plaintiff. In paragraph 3 thereof the Defendant stated thus;

> ***"You recall our father's book and my role. The other day you brought papers to sign dispossessing myself of my role which I painfully did for you the last born!!....."***

In the last paragraph of the same letter, the Defendant also stated thus;

> ***"Finally, next time you want us to take a decision we either follow the book, sentiments or general consensus but not to mix either of them."***

Reliance on "***the book"*** by the Defendant is not only a manifestly overt admission by him as to its authenticity, but also clear testimony and acknowledgment by him of the caretaker role which the deceased assigned him on behalf of his siblings with regard to the suit property. Accordingly, the Defendant would be estopped denying; not only the evidence as to the content of ***"the book",*** but also his implied role as a trustee conferred upon him therein.

On basis of the foregone reasons, ***Exhibit P23*** and the translated extracts thereof; in so far as they relate to the suit property, are admissible as credible documentary evidence, and have probative evidential value to prove the contents therein. This invariably renders unobtainable the Defendant's assertions that evidence of the ***"the book"*** cannot be relied upon.

To resolve the issue whether or not the deceased had the capacity to write the Defendant's name on the suit property because it was public and unregistered land vested in the Uganda Land Commission, again regard must be had to evidence in ***Exhibit P24,*** the English translated extract from ***Exhibit P23***. The relevant content specifically bearing on this particular issue appears in following statements of the deceased;

> ***"…. I have started building on Plot 11, Kisoro Road. I have written Benon Kabagambe's names on it in the knowledge that if it were completed it would help his siblings. In building, I utilized shillings from my salary and cattle."***

The deceased went further and stated in the said exhibit that;

> ***"I have started constructing this house myself alone though I wrote on it Benon Kabagambe's name on lease, but I am the one building using my own money which I would have left behind for the young children or the money I would have used in my old age. In case I am no longer there, Benon will be the care taker on behalf of the young ones who may not be able and the girls…."***

The above content must be read in light of ***Exhibit D1*** (initial lease offer), ***Exhibit D9*** (extension of lease offer) and ***Exhibit P1*** (certificate of title), which show the Defendant as the registered proprietor of the suit property in accordance with ***Section 56*** of the

***Registration of Titles Act (Cap 205)*** which was the law applicable then (now ***Sections 59*** and ***64*** of the ***Registration of Titles Act (Cap 230))***.

Indeed, this court is alive to the fact that the suit land was public land which vested in the Uganda Land Commission, which had the authority to lease it out, and from whom the Defendant acquired the lease in question. Court is also acutely aware of the holding in the ***Bugisu Co-operative Union Ltd v. Lawrence Kitts (supra)*** case, and entirely agrees that the case correctly restates the principles encapsulated in the above cited legislations.

My understanding of the current dispute, however, is that what is being challenged lies not in how the Defendant ever got to be registered on the lease to the suit property – because that is clear enough from the evidence - but rather that the intention and purpose for which he got registered was solely to hold the suit property in trust for his siblings as beneficiaries; and not as the owner for his sole benefit. This assertion by the Plaintiff is vehemently refuted by the Defendant, hence constitutes the core of; if not the actual dispute itself.

Apart from the above, the reading of ***Bugisu Co-operative Union Ltd v. Lawrence Kitts (Supra)*** brings to the fore that the ***Public Lands Act (supra)*** and the ***Land Reform Decree (supra)*** did recognise and acknowledge the existence of unregistered interest by holders of customary tenure on public land.

In ***Paul Kiekie Saku v. Seventh Day Adventist Church, S.C.Civ.Appeal No. 8 of 1993,*** which was cited in ***Bugisu Co-operative Union Ltd v. Lawrence Kitts (supra)***, it was held, *inter alia*, that the Decree saved the system of occupying public land by customary tenure, but that such customary tenure holding was at sufferance, and the Uganda Land Commission had a right and could grant a lease to any person including the holder of the customary tenure.

The position enunciated in both cases above, as it relates to the context of the instant case, means that it would not be inconceivable that the deceased was a holder of a customary tenure on the suit land whilst it was public land, and had the right to apply for a lease on it. But owing to his clear intention as he demonstrated it in ***Exhibit P25*** (a letter to Benon and William dated 10/02/1971) - which was to have a family house in Kisoro town for the benefit of his entire family when he was no longer alive - he decided to entrust and secure his

interest by having the suit property leased in the names of the Defendant; but for the benefit of the rest of the family members.

The above findings are firmly buttressed by the deceased's clear and unmistakable intention in ***Exhibit P25*** in which he stated that;

> ***"…. I have written Benon Kabagambe's name on it in the knowledge that if it were completed it would help his siblings…."***

Further, that;

> ***"…. I have started constructing this house myself alone though I wrote on it Benon Kabagambe's names on lease… In case I am no longer there, Benon will be the caretaker on behalf of the young ones who may not be able and the girls…." (Underlined for emphasis).***

The above quotes mirror a demonstrably clear and unambiguous intention of deceased to have the suit property leased in the Defendant's names, but to be held in trust of the prescribed siblings. The deceased's express statements, in my view, would effectively dispel any contrary notion that the Defendant solely owned that suit property - even though his names were registered on the lease. The deceased, essentially, never intended for the Defendant to hold the suit property as sole owner, but in trust for his younger siblings and the girls who are the beneficiaries. I believe that this finding puts to rest that point.

Having found as above, it is called for to restate, briefly though, some basic principles as they apply to property held in trust, such as the suit property in the instant case. ***Black's Law Dictionary (8th Edition) at pg 1546***, defines "a trust" as the right enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary).

***Margaret Halliwell*** in her book ***Equity And Trusts, (4th Edition) at page 1,*** propounds that under a trust the legal title will be vested in the trustees and the equitable title in the beneficiaries under the trust. This might arise where settlor, (such as the deceased in the instant case) transfers land to trustee, (such as was transferred to the Defendant in this case)

to hold the land on trust for the benefit of the beneficiaries, (such as the younger siblings and girls in the instant case).

The learned author further elucidates that the trust does not interfere with the legal position of title to the land; which at law is in the trustee since it was conveyed to him or her by the settlor. However, equity recognises that the title was not conveyed to the trustee for his or her own use or benefit, but to be held for the benefit of the beneficiaries as the settlor intended. The trustee is thus considered as having a bare legal title only and the benefits of the land will accrue to the beneficiaries.

Based on the authoritative legal exposition above, it would seem clear to me that the holding of the suit property in trust legally mandates that the trustee under such an arrangement holds the property for the benefit of the other(s). See also ***J.G. Riddal, The Law of Trusts, (6th Edition) at page 1.***

Further, that for a trust to be valid, it must involve specific property, reflect the settlor's intent and be created for a lawful purpose. It entails a fiduciary relationship regarding specific property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee together with the trustee's obligations toward the property and the beneficiary. Accordingly, a trust arises as a result of a manifestation of an intention to create it; as was the case in the instant case.

Trusts have variously been classified, but the one in the instant case is, by implication, a simple trust; defined as one which does not itself impose any active duties on the trustee, but leaves these for the law to impose. Given the principles involved, one would rightly infer the existence of an implied trustee - beneficiary relationship in the instant case as between the Defendant and the Plaintiff and the other siblings; even though not expressly executed as a trust.

Evidently, a simple trust, also known as a mandatory trust, having been created requires that the Defendant as a trustee distributes the property and/ or profits generated by the trust property to the designated beneficiaries. The trust was created the moment the deceased had the Defendant's name registered on the suit property lease with the intention that when the

construction thereon was completed, the house would help the Defendant's siblings; for whom he would be the caretaker.

In effect, the Defendant only acquired and holds the legal title in the suit property subject to the beneficial interest of the prescribed beneficiaries, who include the Plaintiff. Now that the beneficiaries have come of age and are demanding for the property held under trust, the rule in ***Saunder v. Vautier (1841) 4 Beav 115*** applies; that if the beneficiaries are of full majority age, and having fulfilled all conditions contingent upon the trust, the trustee is under obligation to distribute suit property amongst them in equal share. This is what is precisely required of the Defendant as a trustee in the instant case to do now in accordance with the (settlor's) deceased's wishes without any further procrastination.

The Defendant, asked this court to juxtapose ***Exhibit P24*** (a translated extract of ***Exhibit P23***) with ***Exhibits D1*** (the initial two years' lease offer granted to the Defendant from 01/04/1969 subject to the completion of the building covenant upon completion of which the lease would be extended for a total period of forty-nine years), ***Exhibit D8*** (an agreement between Defendant and Andrew Banegwa and Bukara for digging the foundation) and ***Exhibit D11*** (an agreement between the Defendant and John Wilson Nzabanita to build a ceiling in the house). The Defendant opined that when analysed and contrasted, the said ***Exhibits*** would clearly show that by 1970, the suit property belonged to the Defendant and the deceased was aware.

In consideration of the above point; and at the risk of repetition, there is no dispute that the lease was right from inception applied for and registered in the Defendant's name, and thus legally belongs to him. It was nonetheless, done with the deceased's consent; who initially owned the land albeit with an unregistered interest. Logically, the deceased would have no reason whatsoever to oppose the Defendant's registration on the lease; which he consented to essentially for the reasons aforementioned.

The finding above is rooted in evidence content of ***Exhibit P 24 and P25***, in which the deceased was categorical that he had commence construction on ***Plot 11, Kisoro Road*** alone and utilized money from his salary and cattle; which he would have otherwise left behind for the young children or used in his old age. As if for avoidance of any doubt, the deceased further clarified, in ***Exhibit P25*** (a letter to Benon and William) in paragraph 3 thereof, that

he and his wife tried as hard as they could to build a house on the suit plot, and the remaining activities were shuttering and roofing.

If by February, 1971 when the letter - ***Exhibit P25*** **-** to Benon and William was authored construction of the house was at roofing level, it could only mean that actual construction had been commenced much earlier, and it clearly demonstrates that in commencing the construction the deceased must have been acutely aware of the construction covenant within the lease offer/ agreement and endeavoured to comply with it. Certainly, he would not have gone to these lengths if he had no stake in the suit land, and if it solely belonged to the Defendant.

The Defendant also sought to rely on ***Exhibit D8*** *and* ***D11*** to show that he; and not his deceased father, started the construction since he contracted the persons who laid the foundation and built the ceiling respectively. An agreement with the contractors was made on the 19/07/1969, and it shows that one of the members present was the deceased. The said agreement, which appears to have been executed between the Defendant and Andrew Banegwa and Bukara, also shows that only the latter two appended their thumb prints, but that the Defendant never signed it. The deceased signed only as a member present.

The above evidence lends strong credence to the finding of fact that the Defendant was actually never physically part of the construction agreement, but his name was used by the deceased - just like he had done in the lease application - for the same reasons earlier explained that the Defendant would only be a caretaker. It is evident that the deceased actually contracted the foundation constructors himself way back in 1969. The same trend of events also applies to ***Exhibit D11*** relied upon by the Defendant, and thus attracts a similar conclusion.

Referring to ***Exhibit D7*** of 1969, the Defendant contended that the deceased wrote to him to advise on building strategies and record-keeping during construction, and to encourage him to work with Kikkides, and pledged to give him a car to help in some of the activities. On basis of these facts the Defendant argues that he was the one who was constructing the suit property, and that the deceased was aware. Further, that the deceased would not have pledged his car if he had been the one carrying out the construction.

With due respect, it would seem to me that by advancing such an argument as the above, the Defendant tended to be oblivious of the obvious intention which prompted the deceased to act in the way he did. It would, therefore, be instructive to read once more the contents of letter ***Exhibit P25,*** in which the deceased was urging his two elder sons, Benon and William, to lend him a hand in the construction effort. At page 4, in paragraph 1 thereof, the deceased appears to vent his frustrations with William's inaction when he states;

> ***"…. William, refusing to contribute to the construction of the house, is it for Benon alone or for the whole family…." (Underlined for emphasis).***

In the context of the extract, it goes to show that the deceased greatly involved Benon (the Defendant) in the process, with the expressed intention of having the suit property as a family house. Therefore, the deceased's advice, offers and involvement of the Defendant were justified within the context of having the suit property ***for the whole family***.

The Defendant appears to have appropriately responded to his deceased father's call to provide help in construction as early as 1969; which is the reason why he was commended. But this in no way suggests that it was the Defendant doing the construction. Had the entire process of lease acquisition and construction been exclusively done by the Defendant, there would have been no reason for deceased's intensive and selfless involvement in the project as reflected in his letter ***Exhibit D7***.

***Exhibit D10,*** (the collective attachments of receipts) shows the record of construction materials purchased in the building process. The ***Exhibit*** seems to contradict the Defendant's claims in every respect that he initiated and completed the entire construction process. The receipts in question in fact show that the materials purchased were those relevant only for the ceiling and finishing, but not for the initial construction stages. They are dated between 1971 - which was well after the deceased's letter, ***Exhibit P25*** - to 1974.

Logically, if anything ***Exhibit D10*** brings into question why the Defendant would be so keen only in keeping these particular receipts, but not exercise similar diligence in obtaining and keeping the receipts for materials or items in the initial stages of construction - which he claims to have done all by himself. It is evident that if the Defendant had any hand in the construction of the suit house at all, he could only have started doing so from the ceiling to

the finishing stages, but the initial construction was basically done by the deceased in compliance with the construction covenant in the lease.

As regards ***Exhibit P15*** - in which the Defendant had transferred shares in the suit property to his siblings as beneficiaries but later withdrew – its reading intrinsically betrays the Defendant's reaffirmation that he was all along cognisant that the suit property was not exclusively his, but that he was meant to be a beneficiary along with the others. Withdrawing the purported offer was vividly an implied admission by the Defendant that he legally held the suit property subject to the beneficiaries' interest. The claim that the transfer had been done out of sheer love and affection is rather simplistic, hollow and too transparent to be a white wash, and is untenable given the weight of evidence to the contrary.

At the trial, the Defendant emphatically denied ever holding or attending many of family meetings to discuss the estate of the deceased. He also denied being a trustee, and minutes on record, among others. This court had the opportunity to take note of the Defendant's demeanour as he testified, and it invariably betrayed one of a person intentionally attempting to deny or conceal the truth. By firmly claiming and/or just feigning ignorance of the obvious facts, the Defendant came out in bad light as one simply not being straight forward, which rendered his testimony of doubtful quality.
It was found that the Defendant certainly attended the meetings, discussed, *inter alia*, issues related to the suit property, he assumed a role a trustee under the implied trust - whether he liked it or not – and the duties and obligations were imposed by law. Simply to deny all these proven facts is to set oneself against the weight of the evidence; which is rather futile and a little less than astonishing.

As regards the testimony of CW1, Peter Kabatsi, being biased and hearsay, that point has already been partly addressed, and I am unable to appreciate the reasons as to why any issue would be made of his testimony. Suffice to note that he was summoned to testify as *amicus curie* upon court's request as to the authenticity of the various correspondences and minutes of the several meetings to which he was privy and had actively participated in as chairperson, but which the Defendant had vehemently denied.

CW1 was able to confirm that actually the Defendant was present in most of the meetings and that he actively contributed. One such instance is reflected in the minutes in ***Exhibit P4***, and

***Exhibit P8.*** In the latter the Defendant agreed on all issues except those regarding the suit property and he was recorded as having suggested joint ownership with him taking 51% and 49 % for the girls jointly. CW1 is doubtless a credible witness.

Further, CW1 in his letter, ***Exhibit P27,*** expressly stated that as the deceased's nephew he tried to help the family to settle the dispute out of court; and even discussed the idea with the Defendant, who insisted that it is court that will have the final say in the matter. CW1 stressed that he always acted in the matter as *amicus* and so could not be a witness for or against either of the parties to this suit. Clearly, he was not acting in the capacity of a lawyer, and the Defendant's Counsel would not be justified to discredit his evidence on that account. Further still, CW1 was never summoned as an expert witness, but rather as *amicus curiae*, largely because of the immense wealth of information he wielded in this particular case given his previous role in the whole matter.

Regarding Kate Kabagambe's depositions in the affidavit in support of the caveat (***Exhibit P20)*** it only calls for emphasis of court's earlier finding that the Defendant did not fraudulently register his name on the title to the suit property, because he got so registered with the deceased's consent. But even with this position, Kate Kabagambe, as one of beneficiaries, was not precluded from lodging a caveat to safeguard her interest. For the foregone reasons, it follows that even the implications of ***Section 176 RTA (supra)*** as to ejectment of a registered proprietor, which Counsel for the Defendant had tried to argue about would not arise.

For avoidance of doubt, Issue No. 1 is resolved as follows: the legal title in the suit property vests in the Defendant, and the equitable title in the beneficiaries named in ***Exhibit P3*** under a simple trust. To that extent, the Defendant is considered as having a bare legal title only, and cannot deal with the suit property as he pleases, but in accordance with the duties and obligations under a trust.

***ISSUE 2:***

***Whether the Defendant is a trespasser on the suit land.***

This issue has already been pronounced upon above. For purposes of authoritatively backing up the finding, this court relies on the case of ***F.D.K Zaabwe v. Orient Bank & 5 O'rs,***

***H.C.Civil Suit No. 715 of 1999)[2002] UGHC 40,*** where trespass was defined as the unlawful interference with one's person, property or rights. ***Black's Law Dictionary (8th Edition) at page 1541*** also defines trespass as***;***

> ***"An unlawful act committed against the person or property of another; esp., wrongful entry on another's real property."***

The operative phrase in the definitions above is "unlawful" which, in my view, is directly derived from the action(s) of one who intentionally and without consent or privilege enters another's property.

Given these authoritative definitions, the Defendant cannot be classified as a trespasser when he lawfully holds title to the suit property from the deceased who registered the Defendant's names on the lease, albeit for the benefit of the prescribed beneficiaries. The Defendant therefore lawfully entered onto the suit property with the consent of the deceased. Issue No.2 is answered in the negative.

***ISSUE 3:***

***The remedies available to the parties.***

The Plaintiff reiterated and made the following prayers in his plaint and in his Counsel's written submissions;

1. ***A declaration that the suit property comprises part of the estate of the deceased***
2. ***An order directing the Defendant to surrender the duplicate certificate of title to the suit land to the Plaintiff as administrator of the estate of the deceased***
3. ***An order directing the Defendant to sign and deliver to the Plaintiff a valid and registerable transfer in favour of the administrator of the estate.***
4. ***An order directing the Defendant to account to the estate for proceeds he received from the suit property since 1972.***
5. ***Costs of the suit.***

On his part the Defendant sought the following remedies;

1. ***That this suit be dismissed with costs and a consequential declaration be made that he is the registered owner of the suit property***

2. ***That the Respondent in HCT-05-CV-MA-56-2010 be ordered to remove her caveat from the Defendant's certificate of title.***
3. ***That the Application vide HCT-05-CV-MA-56-2010 also be allowed with costs.***

In a strict legal sense, the suit property does not comprise the estate of the deceased, but is legally owned by the Defendant. Technically, it would be untenable to order the Defendant to hand over the duplicate certificate of title to the Plaintiff, who is the administrator of the deceased's estate. As a trustee, however, the Defendant is under a duty to ensure that trust property passes to those entitled under it. The failure to do so is a breach of trust. Accordingly;

1. ***The Defendant is ordered to execute a transfer of the suit property into each of the prescribed beneficiary's names in equal share.***
2. ***The Defendant is further ordered to give a full account of the proceeds from the suit property to the beneficiaries from 1972 up to the date of this judgment.***
3. ***For avoidance of doubt, the Defendant is also a beneficiary in the suit property, and should benefit in equal measure as the other beneficiaries.***
4. ***Kate Kabagambe, the Respondent in HCT-05-CV-MA-56-2010 is ordered to vacate the caveat she lodged on the certificate of title to the suit property; only to ensure the successful transfer of the same into the beneficiaries' names; and each party will bear its own costs of the application.***

5. ***The Plaintiff is awarded costs of the main suit.***

***BASHAIJA K. ANDREW***

***JUDGE***

***30/04/2013.***